

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS LAPHAM and ROXANA LAPHAM,

Plaintiffs,

UNPUBLISHED
July 19, 2011

v

No. 295482
Wayne Circuit Court
LC No. 07-704255-NO

JACOBS TECHNOLOGY, INC.,

Defendant/Third-Party Plaintiff-
Appellant,

and

DUSTIN MAY,

Defendant-Third-Party Plaintiff,

and

DE-CAL, INC., d/b/a DE-CAL MECHANICAL,
and d/b/a ALLIED MECHANICAL PIPING,
INC.,

Third-Party Defendant-Appellee.

INDIANA INSURANCE COMPANY and
NETHERLANDS INSURANCE COMPANY,

Plaintiffs/Counter-Defendants-
Appellees,

v

No. 295489
Wayne Circuit Court
LC No. 07-731773-CK

DE-CAL, INC., d/b/a DE-CAL MECHANICAL,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,

and

DUSTIN MAY,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff,

and

JACOBS TECHNOLOGY, INC.,

Defendant/Counter-
Plaintiff/Appellant,

and

THOMAS LAPHAM, ROXANA LAPHAM, ACE
AMERICAN INSURANCE COMPANY, and
LEXINGTON INSURANCE COMPANY,

Defendants,

and

WESTCHESTER SURPLUS LINES
INSURANCE COMPANY,

Third-Party Defendant/Counter-
Plaintiff.

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

In these consolidated cases, Jacobs Technology, Inc., appeals as of right from the trial court's order granting third-party defendant De-Cal, Inc.'s motion for summary disposition with respect to Jacob Technology's third-party complaint in LC No. 07-704255-NO, and denying Jacobs Technology's cross-motion for summary disposition on the issue of attorney fees. Jacobs Technology also appeals the trial court's order in LC No. 07-731773-CK, denying Jacob Technology's motion for summary disposition of its counterclaim that Indiana Insurance Company and Netherlands Insurance Company breached their duty to provide independent counsel in the underlying action in LC No. 07-704255-NO. We affirm.

These actions arise from work-related injuries to Thomas Lapham, who was injured when he was exposed to Freon gas while changing a valve on a condenser/compressor system at a Ford Motor Company testing facility. In LC No. 07-704255-NO, Lapham and his wife Roxana filed a personal injury action against Jacobs Technology and its project manager, Dustin May, alleging

that Jacobs Technology was responsible for purging the system of pressure and gas before Lapham performed his work, and it had assured him that the system was clear, but that the system had not actually been fully purged. Lapham was employed by De-Cal, which was hired as a subcontractor by Jacobs Technology. Pursuant to an indemnification agreement between De-Cal and Jacobs Technology, De-Cal obtained insurance coverage from Indiana Insurance Company and Netherlands Insurance Company that protected both De-Cal and Jacobs Technology.¹ Jacobs Technology thereafter filed a third-party complaint against De-Cal in the Laphams' personal injury action.

Because of the competing claims against Jacobs Technology and De-Cal, Indiana Insurance provided Jacobs Technology with independent counsel, namely, the Cardelli, Lanfear & Buikema, P.C., law firm ("the Cardelli firm"), to defend it in the underlying personal injury action. However, Jacobs Technology also retained its own outside counsel, the Wright, Robinson, Ostheimer & Tatum ("Wright Robinson") law firm, in connection with the case, and the Wright Robinson firm was responsible for filing and prosecuting the third-party complaint against De-Cal.

Indiana Insurance and Netherlands Insurance thereafter filed a separate declaratory judgment action against Jacobs Technology and De-Cal in LC No. 07-731773-CK, contesting their insurance obligations to both Jacobs Technology and De-Cal. Jacobs Technology filed a counterclaim in that action, alleging that Indiana Insurance violated its duty to defend by failing to provide truly independent counsel in the underlying personal injury action.

The personal injury action was eventually settled and the settlement proceeds were paid entirely by Indiana Insurance, which also paid all expenses of the Cardelli firm related to its representation of Jacobs Technology. After the settlement, Indiana Insurance agreed to voluntarily dismiss its declaratory judgment action. However, Jacobs Technology's third-party complaint against De-Cal in the personal injury action, and its counterclaim in the declaratory judgment action both remained pending. In both cases, Jacobs Technology sought to recover its attorney fees and costs related to its retention of the Wright Robinson firm.

The parties filed cross-motions for summary disposition in both cases. The trial court granted summary disposition for Indiana Insurance and Netherlands Insurance with respect to Jacobs Technology's counterclaim that the insurance companies breached their duty to provide a defense by failing to provide truly independent counsel to defend Jacobs Technology in the underlying personal injury action. The court also rejected Jacob Technology's argument that the insurance companies were required to reimburse it for its costs associated with the filing and prosecution of the third-party complaint in the personal injury action. In addition, the court denied Jacobs Technology's request to depose attorneys of the Cardelli firm, and denied Jacobs Technology's request for sanctions against Indiana Insurance and Netherlands Insurance on the

¹ Indiana Insurance Company and Netherlands Insurance Company are apparently affiliated companies. For purposes of this opinion, we shall refer to these companies collectively as "Indiana Insurance," consistent with Jacob Technology's brief on appeal.

ground that their declaratory judgment action was frivolous. With respect to the third-party complaint against De-Cal in the personal injury action, the trial court granted De-Cal's motion for summary disposition of that complaint and denied Jacobs Technology's cross-motion for summary disposition with respect to attorney fees. These appeals followed.

I. STANDARD OF REVIEW

Neither the parties nor the trial court identified the applicable subrule under which their various motions for summary disposition were brought and decided. However, the parties relied extensively on documentary evidence to support their respective arguments, so it is appropriate to review the motions under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2); see also *Mich Mut Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994).

II. INDEPENDENT COUNSEL

Jacobs Technology argues that the trial court erred in denying its motion for summary disposition with respect to its claim that Indiana Insurance breached its duty to defend because the law firm that it retained to represent Jacobs Technology, the Cardelli firm, was not truly independent.

In *Central Mich Bd of Trustees v Employers Reinsurance Corp*, 117 F Supp 2d 627, 634-635 (ED Mich, 2000), the court explained:

[U]nder Michigan law an insurer complies with its duty to defend when, after it has reserved its rights to contest its obligation to indemnify, it fully informs the insured of the nature of the conflict and selects independent counsel to represent the insured in the underlying litigation. The insured has no absolute right to select the attorney himself, as long as the insurer exercises good faith in its selection and the attorney selected is truly independent.

In this case, a conflict necessitating the need for independent counsel existed because Jacobs Technology and De-Cal were both insureds of Indiana Insurance and there were allegations that each party had contributed to Lapham's injuries. Therefore, Indiana Insurance selected the Cardelli firm as independent counsel to defend Jacobs Technology in the Lapham personal injury lawsuit. Contrary to Jacobs Technology's contention that the Cardelli firm was not advised of the conflict, the submitted evidence indicates that correspondence referring to the conflict and the need for independent counsel was sent to both Jacobs Technology and the Cardelli firm. Thus, the issue is whether Indiana Insurance acted in good faith and selected counsel that was truly independent.

The relationship between an insurance company, an insured, and independent counsel is discussed in *Mich Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482, 491-492; 496 NW2d 373 (1992), *aff'd* 445 Mich 558 (1994), overruled in part on other grounds in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63; 664 NW2d 776 (2003), as follows:

An insurance company may tender a defense under a reservation of rights and retain independent counsel to represent its insured. *Frankenmuth Mutual Ins Co, Inc v Eurich*, 152 Mich App 683, 688; 394 NW2d 70 (1986). No attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not the insurer. *Atlanta Int'l Ins Co v Bell*, 181 Mich App 272, 274; 448 NW2d 804 (1989), *aff'd* in part and *rev'd* in part 438 Mich 512 (1991); *American Employers' Ins Co v Medical Protective Co*, 165 Mich App 657, 660; 419 NW2d 447 (1988). In the absence of any record showing by Bronson that the law firm in fact acted against the interests of Bronson, we will not presume that the firm had failed or would fail to carry out its responsibilities to its client. [Footnote omitted.]

In this case, Jacobs Technology failed to submit evidence showing that the Cardelli firm acted against Jacobs Technology's interests or failed to carry out its responsibilities to Jacobs Technology. Jacobs Technology's reliance on correspondence between the Cardelli firm and Indiana Insurance concerning the third-party complaint does not establish that the Cardelli firm acted contrary to Jacob Technology's interests or failed to carry out its responsibilities to Jacobs Technology. Indiana Insurance's obligation was to provide a defense to the Lapham personal injury action. The Cardelli firm had the right to clarify whether pursuit of a third-party claim against De-Cal was part of the defense that Indiana Insurance was required to provide. Moreover, as further explained in section III, *infra*, Jacobs Technology's third-party complaint involved independent claims that were not part of the defense of the personal injury action, so there was no duty by Indiana Insurance to provide coverage for pursuit of that complaint.

Similarly, communications between the Cardelli firm and Indiana Insurance regarding billing issues is not enough to show that the Cardelli firm acted against Jacobs Technology's interests. Although the Cardelli firm was selected to represent Jacobs Technology, it was being paid by Indiana Insurance.

Jacobs Technology also argues that Indiana Insurance asserted control over the defense in the personal injury case, relying on comments in Indiana Insurance's records in support of this claim. Viewed in context, however, it is clear that the comments were directed at Jacobs Technology's efforts to pursue the third-party complaint, and Indiana Insurance's determination that the third-party complaint was not relevant to a defense of the underlying personal injury action. The comments do not support Jacobs Technology's claim that the Cardelli firm was not acting as independent counsel with respect to the defense of the Lapham personal injury action.

In sum, Jacobs Technology submitted evidence showing that the Cardelli firm had regular contact with Indiana Insurance, but the evidence does not show that the Cardelli firm was acting against Jacobs Technology's interests. Jacobs Technology did not offer any evidence of specific instances where the Cardelli firm communicated any strategies or confidential

information that adversely affected Jacobs Technology's interests. More significantly, there is nothing to suggest that the Cardelli firm's representation adversely affected Jacobs Technology. The personal injury case was settled and it is undisputed that the settlement proceeds were paid by Indiana Insurance, which also paid all expenses of the Cardelli firm related to its representation of Jacobs Technology. Thus, the final result in the underlying litigation was favorable to Jacobs Technology's interests.

For the same reasons, the trial court did not err in granting summary disposition in favor of De-Cal. Jacobs Technology was provided with a defense and independent counsel in the personal injury action through insurance procured by De-Cal, and Jacobs Technology was not obligated to pay any money in settlement of the underlying action. Thus, there was no basis for finding that De-Cal had any further obligation to Jacobs Technology.

III. THE THIRD-PARTY COMPLAINT

Jacobs Technology argues that the trial court erred in denying its motion for recovery of attorney fees and costs for work performed by the Wright Robinson firm in connection with the filing and prosecution of the third-party complaint against De-Cal. Jacobs Technology contends that the third-party complaint was inextricably intertwined with its attempt to limit or defeat liability in the Lapham personal injury action and, therefore, Indiana Insurance is liable for those expenses pursuant to its duty to provide a defense to that action. We disagree.

Jacobs Technology relies on cases from other jurisdictions which recognize that third-party actions can be used "defensively," thereby requiring an insurer to pay for those costs as part of its duty to defend. See, e.g., *Great West Cas Co v Marathon Oil Co*, 315 F Supp 2d 879, 882-883 (ND Ill, 2003), in which the court stated:

Claims and actions seeking third-party contribution and indemnification are a means of avoiding liability just as clearly as is contesting the claims alleged to give rise to liability. A duty to defend would be nothing but a form of words if it did not encompass all litigation by the insured which could defeat its liability, including claims and actions for contribution and indemnification.

Jacobs Technology's reliance on these foreign jurisdiction cases is misplaced because they involve situations where contribution was available among joint tortfeasors. Under tort reform in Michigan, actions for contribution under MCL 600.2925a are no longer viable. *Kokx v Bylenga*, 241 Mich App 655, 661-664; 617 NW2d 368 (2000). Rather, as Indiana Insurance argues, the appropriate way for Jacobs Technology to limit its liability based on De-Cal's alleged percentage of fault was to file a notice of non-party at fault and allow the jury to determine the percentage of fault of all parties who contributed to the injury. MCR 2.112(K); MCL 600.2957; MCL 600.6304. Thus, a third-party complaint was not necessary for Jacobs Technology to limit its liability based on De-Cal's alleged percentage of fault.

The only legally significant purpose of Jacobs Technology's third-party complaint was to enforce its contractual right to indemnification, but services rendered in establishing and enforcing that contractual right go beyond defense of the underlying personal injury claim. See *Hayes v Gen Motors Corp*, 106 Mich App 188, 200-202; 308 NW2d 452 (1981). Because

Indiana Insurance's obligation was limited to providing a defense to the underlying personal injury claim, the trial court did not err in determining that it was not liable for the fees and costs associated with the third-party complaint to enforce Jacobs Technology's contractual right to indemnification.

IV. DISCOVERY

Jacobs Technology also argues that the trial court erred by prohibiting it from deposing attorneys at the Cardelli firm. Jacobs Technology's argument on this issue is limited to its claim that the trial court erroneously relied on the attorney-client and work-product privileges to determine that Jacobs Technology was not permitted to depose the attorneys. However, the record clearly shows that Jacobs Technology had waived those privileges before the hearing on the Cardelli firm's motion to quash the deposition subpoenas, and that the trial court was informed that the Cardelli firm was no longer relying on the privileges to challenge the subpoenas. Instead, the Cardelli firm argued that the subpoenas should be quashed because relevant information and materials concerning its communications and relationship with Indiana Insurance had already been provided to Jacobs Technology pursuant to other discovery requests, the subpoenas were issued only for harassment purposes, and the trial court should first hear the parties' pending motions for summary disposition to determine whether further discovery was necessary. Given this record, there is no basis for concluding that the trial court relied on the attorney-client and work-product privileges to conclude that Jacobs Technology was not permitted to depose the Cardelli firm's attorneys. Further, because Jacobs Technology does not address any of the grounds for quashing the subpoenas that were argued at the hearing in the trial court, it is not entitled to relief with respect to this issue. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

V. SANCTIONS

Jacobs Technology lastly argues that the trial court erred by denying its request for sanctions against Indiana Insurance. Jacobs Technology contends that it was entitled to sanctions because Indiana Insurance's complaint in the declaratory judgment action was frivolous. We disagree.

The applicable standard of review is summarized in *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008):

[W]ith respect to an award of attorney fees, we review underlying findings of fact for clear error, *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002), while questions of law are reviewed de novo, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). But we review the court's decision whether to award attorney fees and the determination of the reasonableness of the fees for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). The court does not abuse its discretion when its decision is within the range of reasonable and principled outcomes. *Patrick v Shaw*, 275 Mich App 201, 204; 739 NW2d 365 (2007), mod 480 Mich 1050 (2008).

MCR 2.114(D) imposes an affirmative duty on an attorney to conduct a reasonable inquiry into both the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). “The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case.” *Id.*

Although Jacobs Technology argues that there was no factual support for Indiana Insurance’s reliance on exclusions to coverage, it does not dispute that it would not have been entitled to coverage if it was solely and exclusively responsible for Lapham’s injuries. Jacobs Technology contends that there was no basis for believing that it was solely and exclusively responsible because Indiana Insurance investigators had opined before the declaratory action was filed that, although Jacobs Technology’s share of liability was “significant,” De-Cal likely was also partially liable. However, this attempt to apportion liability based on a preliminary, incomplete investigation does not establish that there was no merit to the “sole negligence” exclusion. Further, as the trial court noted, the purpose of the declaratory judgment action was also to determine priorities among insurers. The trial court did not clearly err in finding that the declaratory judgment action was not frivolous.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause